SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

16

No. 16

LEROY GRAHAM, ET AL.,

Petitioners,

vs.

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR PETITIONERS

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Opinions Below

The opinion of the district court granting petitioners a preliminary injunction is reported in 74 F. Supp. 663 and may be found at pages 62 to 66 of the record. The opinion of the court of appeals, which has not yet been reported, may be found at pages 73 to 79 of the record.

Jurisdiction

The judgment of the court of appeals was entered on October 26, 1948 (R. 80). The petition for writ of certiorari

was filed on December 7, 1948, and was granted on June 27, 1949 (R. 84). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended (now 28 U. S. C. § 1254).

Statutes Involved

The pertinent provisions of the statutes involved in this case are set out in the Appendix.

Questions Presented

1. Whether the District Court for the District of Columbia has the dual jurisdiction of both a federal and a state court so that the "local" venue statute of the District of Columbia may be applied to a suit brought under the Railway Labor Act, which, in any of the States, could be brought in either the federal or the state court.

2. Whether District of Columbia lodges of the respondent Brotherhood of Locomotive Firemen and Enginemen and the secretaries of these lodges "fairly insure the adequate representation" of the entire class of membership of the respondent Brotherhood under Rule 23(a) of the Federal Rules of Civil Procedure for purposes of supporting venue in a class action in the District.

3. Whether the respondent Brotherhood of Locomotive Firemen and Enginemen was properly served with process.

4. Whether the Norris-LaGuardia Act prevented the district court from issuing a preliminary injunction restraining any additional discriminatory conduct by the Brotherhood during the pendency of the action.

5. Whether the district court abused its discretion in granting the preliminary injunction.

6. Whether, if the cause is remanded to the court of appeals for decision on any of the above questions, this

Court should direct the reinstatement of the preliminary injunction issued by the district court and vacated by the court below.

Statement

1. *Institution of Suit:* On October 27, 1947, petitioners, 21 negro firemen on the three major southeastern railroads, brought this suit to vindicate their rights under the Railway Labor Act (48 Stat. 1185; 45 U. S. C. §§ 151 et seq.) and the Constitution of the United States. Petitioners instituted the action on their own behalf and on behalf of all other negro firemen similarly situated against the railroads, the respondent Brotherhood of Locomotive Firemen and Enginemen (hereinafter referred to as the Brotherhood), the two District of Columbia Lodges of the Brotherhood and the secretaries of these two lodges (R. 1-4).

Petitioners' cause of action is based upon the decisions of this Court in *Steele* v. *Louisville & Nashville Railroad Co.*, 323 U. S. 192 (1944), and *Tunstall* v. *Brotherhood of Locomotive Firemen and Enginemen*, 323 U. S. 210 (1944). The complaint alleged that the Brotherhood, as sole bargaining agent of the entire class of locomotive firemen, including these petitioners and other negro firemen, had negotiated agreements and arrangements with the railroads which discriminate against colored firemen and deprive them of the rights and job assignments to which their seniority entitles them (R. 6-9). The complaint further alleged that, notwithstanding the determination by this Court that this discrimination was illegal and violative of the Railway Labor Act, respondent Brotherhood and the southeastern carriers continued to discriminate against petitioners and their class, resulting in the unlawful displacement and demotion of many negro firemen and their replacement by white firemen having less seniority (R. 9, 14).

The complaint further alleged that the Brotherhood maintains offices in the District of Columbia, acts as bargaining representative within the District and is otherwise doing business regularly within the District (R. 3); that two subordinate lodges of the Brotherhood maintain offices and secretaries within the District and are composed principally of members of the Brotherhood who reside in the District (R. 3-4); and that "defendants subordinate Lodges . . . are all the lodges of defendant Brotherhood within the District of Columbia and are truly and fairly representatives of the other subordinate lodges of Brotherhood and of Brotherhood itself, and the interest of all the members, subordinate lodges and of the Brotherhood will be adequately represented in this action by the defendants. The defendants subordinate Lodges and the defendants McQuade and Lacey (the secretaries) are sued as representatives of the membership of all the subordinate lodges and of the Brotherhood itself as a class under Rule 23(a) of the Federal Rules of Civil Procedure" (R. 4).

Petitioners' complaint sought a determination of their rights and those of their class, a permanent injunction against any further discriminatory practices, an order directing restoration of jobs unlawfully taken away, damages for loss of employment and wages by reason of the discriminatory practices, and a preliminary injunction pending final hearing and determination of the action (R. 15-16).

2. *Motion for Preliminary Injunction:* At the time of filing the complaint on October 27, 1947, petitioners moved the district court for a preliminary injunction to prevent further discrimination in job assignments pending the final determination of the action (R. 22-23). In support of this motion, petitioners filed a detailed affidavit by Benjamin F. McLaurin, Field Organizer of the Provisional Committee to Organize Colored Locomotive Firemen, who had been

in close and active association with these colored firemen and was fully familiar with the facts and practices complained of (R. 23-24). McLaurin's affidavit, in addition to confirming the allegations of the complaint (R. 24), stated that in 1944 the Supreme Court of the United States in the *Steele* and *Tunstall* cases held the discriminatory practices of the Brotherhood and the railroads involved to be violative of the Railway Labor Act (R. 29); that nevertheless the Brotherhood ignored these decisions and continued to carry out the provisions of the unlawful and discriminatory agreements and arrangements (R. 30); that the displacement of steam power by Diesel locomotives is growing and negro firemen are being displaced at an ever increasing rate; and that unless these discriminatory practices are stopped, the complete elimination of negroes from their time-honored jobs as locomotive firemen in the near future is inevitable (R. 30).

3. *Action of Brotherhood:* The Brotherhood filed no affidavit or other evidence challenging any of the facts set forth in the bill of complaint or the McLaurin affidavit. Instead, it filed a Motion to Dismiss or to Stay Further Proceedings on grounds, among others, of improper venue and failure of service (R. 39-40).

4. *The Position of the United States Government:* The United States filed a memorandum as amicus curiae in the district court in support of petitioners' request for a preliminary injunction. The Government stated in part as follows:

> "• • • we submit that there is a public as well as private interest in this litigation which requires that the defendants' unlawful discriminatory conduct be restrained at the earliest moment. Almost three years have elapsed since the Supreme Court held that the Brotherhood defendant was acting in violation of the federal statute, and that the discrimination based upon

face was 'invidious' as well as 'illegal.' The Brotherhood, and the railroads which have cooperated with it—whether willingly or not—have completely ignored and disregarded the Supreme Court's ruling. They have continued to go their own way without paying any attention to the law of the land as it has been applied to the very contract here in issue by the highest tribunal."

5. *Hearings before the District Court:* On November 10 and 25, 1947, the district court took testimony and heard full and complete arguments on the Brotherhood's motion to dismiss and on petitioners' motion for preliminary injunction (R. 46, 51). The district court gave the Brotherhood every opportunity to challenge the facts in the complaint and the McLaurin affidavit, but the Brotherhood refused to avail itself of the opportunity.

6. *Judgment of the District Court:* The district court denied the Brotherhood's defense of improper venue (R. 50-51) and rejected the Brotherhood's contentions that service had not been properly made (R. 59-61) and that the Norris-LaGuardia Act prevented the issuance of the injunction (R. 65-66). Thereafter the district court granted petitioners' motion for a preliminary injunction against the Brotherhood (R. 62-66) stating that there was "no doubtful question of law" since "we already have rulings by the Supreme Court of the United States and by the Circuit Court of Appeals for the Fourth Circuit condemning as illegal the specific practices set forth in the complaint" (R. 65). On December 3, 1947, the district court entered its findings of fact and conclusions of law and issued a preliminary injunction restraining the Brotherhood and the railroads from discriminating against petitioners and other negro firemen by denying them their seniority rights on job assignments made after the date of the order (R. 70-72).

7. *Proceedings in the Court of Appeals:* The railroads did not appeal from the preliminary injunction, but the Brotherhood petitioned the court below for the allowance of a special appeal under D. C. Code, Section 17-101, and a stay of the preliminary injunction. On December 9, 1947, over petitioners' objections, the court below ordered that the preliminary injunction granted by the district court be stayed pending final action on the petition for special appeal (R. 81). On January 5, 1948, again over petitioners' objections, the court entered an order allowing the special appeal and continuing the stay of the preliminary injunction pending final disposition of the appeal (R. 82). On February 3, 1948, petitioners moved the court to advance the oral argument because the stay made possible continued discrimination, but the motion was denied. Argument was finally heard on April 13, 1948 and on October 26, 1948, the court entered its opinion and judgment holding that the venue in the instant case was "mischosen" (R. 73). The court reversed the district court's holding that the District Court for the District of Columbia has the dual jurisdiction of both federal and state courts so that the "local" venue statute of the District of Columbia may be applied to a case under the Railway Labor Act which, in any of the States, could be brought in either the federal or the state court. The court also reversed the district court's holding that venue was properly laid in the District of Columbia under the federal venue statute considering the case as a class suit, a holding fully supported by the decision of the United States Court of Appeals for the Fourth Circuit in *Tunstall* v. *Brotherhood of Locomotive Firemen and Enginemen*, 148 F. (2d) 403 (C. C. A. 4th, 1945). Rejecting both of these arguments, either of which would sustain venue in the district court, the court below, after having stayed the preliminary injunction for almost a

year, directed the district court to transfer the case to the Northern District of Ohio.[1]

Specification of Errors to Be Urged

The court below erred:

1) In holding that the "local" venue statute of the District of Columbia is inapplicable to a suit under the Railway Labor Act.

2) In holding that local lodges of the Brotherhood and their secretaries will not "fairly insure the adequate representation" of the entire class of the membership of the Brotherhood under Rule 23(a) of the Federal Rules of Civil Procedure.

3) In directing the district court to transfer the case to the Northern District of Ohio without any evidence or finding in the record to indicate that the suit could have been brought in that district.

Summary of Argument

I

Venue was properly laid in the District Court for the District of Columbia because the Brotherhood was properly sued as an entity under the District of Columbia Code (Section 11-306) and because the membership of the Brotherhood was properly sued as a class under the federal venue statute (28 U. S. C. § 112; now 28 U. S. C. § 1391).

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[1] The statute under which the court below purported to act provides for the transfer of a case of mischosen venue "to any district or division in which it could have been brought." 28 U.S.C. § 1406(a). As far as appears from the record and as far as petitioners are informed, the railroads involved do no business in the Northern District of Ohio and the court below made no finding that this case could have been brought there.

A

The Brotherhood is "doing business" in the District of Columbia through its subordinate lodges and its national office located in the District. It is thus "found" in the District of Columbia and subject to suit under the District of Columbia Code.

The "local" venue statute of the District of Columbia is clearly applicable by its terms to this action and there is no suggestion in the statute or legislative history that Congress did not mean what it said. Petitioners' cause of action arises under the Railway Labor Act and is cognizable by both federal and state courts. Since petitioners' suit could have been brought in a state court in another jurisdiction and since the courts of the District of Columbia have the dual jurisdiction of both federal and state courts, it is clear that the "local" venue statute is applicable when the action is brought in the courts of the District of Columbia.

The court below artificially injected the question of Article III versus Article I power into a case where it has no relevance. Article III defines the cases which may be brought in the federal courts; venue is a matter of where suits may be brought in the geographical sense. But even if the question of Article III versus Article I power were relevant, there is no conflict between the Articles as applied to the present case which, in any of the States, could have been brought in either the federal or the state court.

B

The two District of Columbia lodges of the Brotherhood and the secretaries of these lodges are inhabitants of the District of Columbia, thus satisfying the inhabitancy requirement of the federal venue statute. The lodges and their secretaries "insure the adequate representation of

all" the subordinate lodges and the membership of the Brotherhood as a class under Rule 23(a) of the Federal Rules of Civil Procedure. The local lodges and their secretaries have an identical interest with the entire membership of the Brotherhood in the preservation of the Brotherhood's treasury to which they contribute and upon which they rely in time of need. They have a common interest in the successful functioning of the organization and its policies. They have common lawyers whom the institution of this action "did bring . . . in fighting" (*Tunstall* v. *Brotherhood of Locomotive Firemen and Enginemen*, 148 F. (2d) 403, 406) and who will insure that the membership of the Brotherhood is "in fact adequately represented by parties who are present . . ." *Hansberry* v. *Lee*, 311 U. S. 32, 43 (1940).

II

Before both the district court and the court below, respondent Brotherhood urged that it had not been properly served with process, that the Norris-LaGuardia Act prohibited the issuance of the preliminary injunction, and that the preliminary injunction should not have been granted because it alters the status quo. The district court ruled against the Brotherhood on all three contentions and the court below was not called upon to consider them. In its Opposition to the petition for certiorari the Brotherhood stated that "in the event this case is reviewed by this Court, respondent will urge those additional grounds for affirmance" (p. 4, note). Petitioners join the Brotherhood in urging this Court to pass upon these three questions. In the exercise of a sound discretion this Court should now resolve these three questions and terminate the dispute over the preliminary injunction which has already extended over far too long a period during which additional colored firemen have been deprived of their hard-earned rights.

A

Respondent Brotherhood was properly served with process as an entity in its common name under Rule 4(d)(3) and as a class under Rule 23. The district court took testimony and found that the defendant subordinate lodges and their secretaries were served with process and that "their duties and relation to the defendant Brotherhood are such that it is reasonable to conclude that they would give notice of this action to the proper officers of the defendant Brotherhood . . ." (R. 45). Service of process was thus valid against the Brotherhood as an entity in its common name (*Operative Plasterers Association* v. *Case*, 93 F. (2d) 56 (App. D. C., 1937); *Brotherhood of Trainmen* v. *Agnew*, 170 Miss. 604, 155 So. 205 (1934); see *International Shoe Co.* v. *Washington*, 326 U. S. 310, 320 (1945)) and against the membership of the Brotherhood as a class (*Tunstall* v. *Brotherhood of Locomotive Firemen and Enginemen*, 148 F. (2d) 403).

B

The Norris-LaGuardia Act is inapplicable to the present suit to vindicate rights under the later Railway Labor Act. *Tunstall* v. *Brotherhood of Locomotive Firemen and Enginemen*, 323 U. S. 210 (1944); *Virginian Ry. Co.* v. *System Federation*, 300 U. S. 515 (1937). This Court held that a proper cause of action had been made out in the *Tunstall* case despite the fact that the complaint in that case failed to meet the requirements of the Norris-LaGuardia Act for the issuance of an injunction. Earlier, in the *Virginian Ry.* case, this Court expressly held the Norris-LaGuardia Act inapplicable to an effort by employees to vindicate their rights under the Railway Labor Act. No doubt it was because of the *Virginian Ry.* case that the Brotherhood never raised this Norris-LaGuardia point

in six years of litigation concerning the colored firemen until the present suit was instituted.

C

The granting or denial of a preliminary injunction is a matter resting in the sound discretion of the trial court and will not be disturbed except in a plain case of abuse of that discretion. *Meccano Ltd.* v. *John Wanamaker*, 253 U. S. 136, 141 (1920); *Alabama* v. *United States*, 279 U. S. 229 (1929). There was no such abuse here. None of the facts alleged in the complaint or McLaurin's affidavit were in any way disputed by the Brotherhood. The questions of law have been definitely decided against respondent by this Court and the Fourth Circuit Court of Appeals. Public as well as private rights are involved and courts of equity "go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved." *Virginian Ry. Co.* v. *System Federation*, 300 U. S. 515, 552 (1937). Therefore, even if the preliminary injunction could be said to disturb the status quo in the sense that it prevents new discriminations against negro firemen, that consideration could hardly override these compelling reasons for interlocutory relief. But in a real sense the order of the district court preserves the status quo. It does not require the parties to undo the past discriminations against the colored firemen; it requires only that in the future assignment of "runs", petitioners and their class be given the assignments to which their seniority entitles them.

III

Petitioners respectfully urge this Court, if it should determine to send the case back to the court of appeals for action on any of the three questions discussed under Point II, to direct the court below to vacate the stay and

reinstate the preliminary injunction during the pendency of the case in that court. Indeed, unless this ancillary relief is granted, more and more colored firemen will be deprived of their time-honored positions on the southeastern railroads and the ultimate judgment will be a hollow victory.

ARGUMENT

I

Venue Was Properly Laid in the District Court for the District of Columbia

Venue was properly laid in the District Court for the District of Columbia for two independent and valid reasons. First, the Brotherhood was properly sued as an entity under the District of Columbia Code; second, venue was properly laid in the district court under the federal venue statute considering the action as a suit against the membership of the Brotherhood as a class.

A

Venue Was Properly Laid in the District Court under the "Local" Venue Statute of the District of Columbia Code.

Petitioners contended before the district court and before the court of appeals that venue was properly laid against the Brotherhood as an entity in the District of Columbia under the "local" venue statute of the District of Columbia (Section 11-306,[2] D. C. Code) providing for suit

[2] Section 11-306 provides that the district court "shall have cognizance . . . of all cases in law and equity between parties, both or either of which shall be resident or be found within said district . . ." The opinion of the court below discusses only Section 11-308, D.C. Code, although Section 306 is plainly applicable. Section 308 of the same title reinforces the express provisions of Section 306 conferring jurisdiction under the facts of this case. Both sections, of course, contain the all-important word "found".

against a defendant "found" in the District. There cannot be any serious question that the Brotherhood is "doing business" in the District of Columbia [3] and is thus "found" within the District under the "local" venue statute. See *International Shoe Co.* v. *Washington*, 326 U. S. 310, 320 (1945); *Frene* v. *Louisville Cement Co.*, 134 F. (2d) 511 (App. D. C., 1942). The sole question, therefore, is whether this "local" venue statute applies to petitioners' suit.

Petitioners' cause of action in this case, although arising under the Railway Labor Act, is entertainable not only by federal district courts but by state courts as well. This concurrent jurisdiction of both state and federal courts of petitioners' cause of action is clearly indicated by *Steele* v. *Louisville & Nashville Railroad Co.*, 323 U. S. 192 (1944), which arose through the state courts, and *Tunstall* v. *Brotherhood of Locomotive Firemen and Enginemen*, 323 U. S. 210 (1944), which arose through the federal courts. Since petitioners' action could have been brought in a state court in another jurisdiction, it is clear that the "local" venue statute applies when the action is brought in the courts of the District of Columbia.

Exactly why the court below injected the issue of Article III versus Article I power into this case is not clear. Congress, acting under the Commerce Clause (see *Virginian Ry. Co.* v. *System Federation*, 300 U. S. 515, 553 (1937)), passed the Railway Labor Act and gave petitioners rights

[3] The court below did not pass upon the question whether the Brotherhood was "doing business" within the District of Columbia, but it is not believed that the district court's ruling that the Brotherhood was "doing business in the District of Columbia" (R. 50) can be seriously challenged. Two of its subordinate lodges (these were joined as defendants) are located in the District of Columbia and each of the lodges has a substantial number of dues-paying members (R. 4, 52-59). The Brotherhood moreover maintains a national office in the District in which one of its vice-presidents and a clerical assistant are permanently stationed and through which its national legislative activities are carried out (R. 40). In fact, the very Southeastern Carriers Agreement under attack in this case was executed in the District of Columbia (R. 17-19).

enforceable in either federal or state courts. Petitioners have chosen the District of Columbia courts as the forum in which to vindicate these rights—the railroads and the respondent Brotherhood are both doing business in the District—in an effort to enforce the *Steele* and *Tunstall* rulings in a single lawsuit. The District of Columbia venue statute is clearly applicable by its terms to this action and there is no suggestion in the statute or legislative history that Congress did not mean what it there said. The statute is a valid exercise of Congressional power whether enacted under Article III or under Article I, Section 8, Clause 17, or under some other section of the Constitution. There is no more of a constitutional issue raised by the application of the District of Columbia venue statute to this suit than there is by the application of a state venue statute to the ordinary suit in a state court under any of the many federal statutes providing for concurrent federal and state jurisdiction. See *Second Employers' Liability Cases*, 223 U. S. 1 (1912). The court below has thus artificially injected a question of Article III versus Article I power into a case where it has no relevance. But because the court below has based its decision upon this Article III versus Article I issue, counsel feel obliged to deal with the arguments made by the court below on this issue.

* * * * * * *

The dual jurisdiction of the courts of the District of Columbia as both federal and state courts has been settled by authoritative decisions of this Court. Thus, in *Keller v. Potomac Electric Power Co.*, 261 U. S. 428, 442-443 (1923), a unanimous Supreme Court, speaking through Mr. Chief Justice Taft, stated:

> "This (cl. 17, § 8 Art. 1) means that as to the District Congress possesses, not only the power which belongs to it in respect of territory within a state, but

> the power of the state as well. In other words, it possesses a dual authority over the District and may clothe the courts of the District, not only with the jurisdiction and powers of federal courts in the several states, but with such authority as a state may confer on her courts. *Kendall* v. *United States*, 12 Pet. 524, 619. • • • Subject to the guaranties of personal liberty in the amendments and in the original Constitution, Congress has as much power to vest courts of the District with a variety of jurisdiction and powers as a state Legislature has in conferring jurisdiction on its courts."

See, to the same effect, *Postum Cereal Co. v. California Fig Nut Co.*, 272 U. S. 693, 700 (1927).

In *O'Donoghue* v. *United States*, 289 U. S. 516 (1933), this Court, after quoting with approval the above language from the *Keller* case as to the dual jurisdiction of the courts of the District of Columbia (289 U. S. at 545), went on to state that the jurisdiction conferred upon the courts of the District of Columbia under Article III of the Constitution and the jurisdiction conferred under Article I "are not incompatible." 289 U. S. at 546. All that this Court held in the *O'Donoghue* case was that salaries of the judges in the higher courts of the District of Columbia could not be reduced because these courts had been established under Article III; the Court made it abundantly plain in its decision that these District of Columbia courts exercised the dual jurisdiction of federal and state courts. 289 U. S. at 545. All four opinions in *National Mutual Ins. Co.* v. *Tidewater Transfer Co.*, 337 U. S. 582 (1949) recognized this dual jurisdiction of the District of Columbia courts.

This principle had been stated with extreme clarity by the court below in the earlier and apparently overlooked case of *King* v. *Wall & Beaver Street Corp.*, 145 F. (2d)

377, 380 (App. D. C., 1944). There the court, speaking through Chief Justice Groner, had pointed out:

> "The District Court of the United States for the District of Columbia, as we have often said, is clothed with a two-fold jurisdiction. It has all the ordinary and usual jurisdiction of a State court in respect to matters which in a State would be exercised by a State court, and this it attains by Acts of Congress under the provisions of Section 8 of Article I of the Constitution. It likewise has all of the jurisdiction and powers of United States district courts elsewhere, and this jurisdiction is, in turn, conferred by Acts of Congress under Article III of the Constitution. *O'Donoghue* v. *United States*, 289 U. S. 516."

In the *King* case, plaintiffs sought to maintain an action which failed to meet the requirements of the federal venue statute, and was equally improper under the "local" venue statute. Plaintiffs tried to lay venue in the District of Columbia by using part of each statute. The court of appeals correctly held that venue could not be established by intermingling parts of the two venue provisions, but it made clear that there would be jurisdiction if plaintiffs could meet the requirements of either the federal or the "local" venue statute.

We respectfully submit that, in the light of this dual or two-fold jurisdiction of the courts of the District of Columbia, the reasoning in the opinion of the court below is wholly incorrect and has led the court to its patently erroneous conclusion.

(1) The court below seems to have based its decision on the assumption that if the "local" venue statute were applied to this case, it would *affect* or *nullify* the federal venue statute. This overlooks the dual jurisdiction of the courts of the District of Columbia so clearly defined in the

cases referred to above. The application of the "local" venue statute to this cause of action, which could have been brought in either a federal or state court, no more affects or nullifies the federal venue statute than did the application of the Alabama venue statute when the *Steele* case was brought in the state court. Certainly one cannot say that the federal venue statute is *affected* or *nullified* when a state venue statute is applied and a suit is entertained in the state court simply because the suit might also have been brought in a federal court in a situation in which there is concurrent jurisdiction. No more can it be said that the federal venue statute is *affected* or *nullified* when the "local" venue statute of the District of Columbia is applied to a suit in the District of Columbia courts simply because the federal venue statute might have been applied as a result of the concurrent jurisdiction of federal courts of the cause of action.[4]

This erroneous assumption in the opinion below is illustrated by the court's reliance on *Doyle* v. *Loring*, 107 F. (2d) 337 (C. C. A. 6th, 1939), *cert. den.* 309 U. S. 686 (1940). That was a suit in the federal district court in Tennessee by non-resident heirs against a non-resident administratrix for a discovery of the deceased's assets. The suit was brought in the federal court on the basis of diversity of jurisdiction. Venue did not properly

[4] The court below relied (R. 76) upon the following passage from the *O'Donoghue* case: ". . . the judicial power thus conferred is not and cannot be affected by the additional congressional legislation enacted under Article I, § 8, cl. 17, imposing upon such courts other duties, which because that special power is limited to the District, Congress cannot impose upon inferior federal courts elsewhere . . ." (289 U. S. at 546). This passage, a part of a sentence, was written in conection with a wholly different problem: namely, whether Article I power should be construed as authorizing a reduction in judges' salaries expressly forbidden by Article III. This Court, in the very next sentence, pointed out that "the two powers are not incompatible" and should not be so read. There is no incompatibility between the two powers in the case at bar except as the decision of the court below creates it.

lie in the federal district court in Tennessee because neither the plaintiff nor the defendant were residents of the district. The plaintiff in the federal court tried to rely upon the state venue statute, and of course, the court held that the state venue statute could not be applied in the federal court. This Tennessee case is the inverse of the case at bar. Applying the decision below in the instant case to the situation in the Tennessee case, it would amount to this: if the plaintiff there had brought his suit for discovery in the Tennessee state court, the state judge should have refused to entertain the action because there was concurrent jurisdiction in the federal courts and the state judge would be *affecting* or *nullifying* the federal venue statute by applying the local state venue statute to the case before him. Merely to state this proposition illustrates the complete fallacy in the court's reasoning in the instant case.

What may have confused the court below is the difference between "exclusive" and "concurrent" jurisdiction of federal courts. If the case at bar were one of "exclusive" federal jurisdiction—e.g., admiralty, maritime, patent, copyright (28 U. S. C. §§ 1333, 1338)—the case could only be brought in a federal court and therefore, it might conceivably be argued that the "local" venue statute was not intended to apply to a suit in the District of Columbia. But where as here, the case is one of "concurrent" jurisdiction which can be brought in either federal or state courts, if it is brought in a state court, the local state venue statute applies; similarly, if it is brought in the courts of the District of Columbia, the "local" venue statute is equally applicable.

(2) The second erroneous assumption in the opinion below lies in the suggestion that the present case "*requires the exercise of Article III power.*" The present case no more requires the exercise of Article III power because

brought in the courts of the District of Columbia than it would if brought in a state court. The present case does require the exercise of judicial power and since it requires the exercise of judicial power, it may be reviewed by this Court, which, of course, it could not be if it required only the exercise of executive, legislative or administrative power. *Keller* v. *Potomac Electric Power Co.*, 261 U. S. 428 (1923). But the exercise of *judicial* power is quite different from the exercise of *Article III power.*

This difference between Article III power and judicial power is made clear in *Williams* v. *United States*, 289 U. S. 553, 565-566 (1933), holding that the Court of Claims is not an Article III court for purposes of protecting judges' salaries against Congressional action. Nevertheless, this Court there stated that the Court of Claims and other legislative courts "possess and exercise judicial power—as distinguished from legislative, executive, or administrative power—although not conferred in virtue of the third article of the Constitution" (289 U. S. at 566). This Court made this same distinction between judicial power and legislative, executive or administrative power in defining the nature of the courts of the District of Columbia in the *O'Donoghue* case when it stated that Congress "has conferred upon these [D. C.] courts jurisdiction over nonfederal causes of action, or over quasi judicial or administrative matters * * *" (289 U. S. at 545).

Furthermore, even if there were any merit in the suggestion that the present case "requires the exercise of Article III power," it would still be a complete non sequitur to argue from that premise to the conclusion that the "local" venue statute is not applicable to this case. Article III power goes to the question of what types of cases can be brought in the federal courts; venue deals with the question where suits may be brought. The court below went astray when it confused these two questions and read Arti-

cle III in opposition to, rather than in harmony with, Article I. See footnote 4, p. 18, *supra*.

The "local" venue statute is apparently based on Article I, Section 8, Clause 17 of the Constitution[5] and makes it possible for the district court and the court of appeals to entertain judicial actions that would ordinarily be heard in state courts elsewhere than in the District of Columbia. The present case was brought in the District Court for the District of Columbia and was thus properly governed by the venue statute of the District of Columbia.

(3) The court below stated in its opinion that "it is not to be thought that Congress intended that a defendant sued in a case requiring the exercise of such power [Article III] should have less protection in respect of venue when the suit is commenced in the District Court of the United States for the District of Columbia than he would have if the suit had been commenced in any other United States district court also exercising Article III power." The concept of "protection" of the defendant is a wholly gratuitous one as applied to this case, since this is a suit which could have been brought in a state court. *Steele* v. *Louisville & Nashville Railroad Co.*, 323 U. S. 192 (1944). If petitioners had sued the Brotherhood in a state court, the local state venue statute would have applied. How can it be said that there is less protection of defendant when petitioners sue in the courts of the District of Columbia and rely upon the "local" venue statute?

What the decision below really does is to curtail the "protection" given to litigants in the District of Columbia courts by denying them the "state" forum which they

[5] This is not to suggest that the "local" venue statute could not have been enacted as a proper exercise of Article III power, or under some other Congressional authority. We are simply assuming, since the section has historically been a part of the District of Columbia Code, that it was enacted under Article I, Section 8, Clause 17.

would have in any of the States in cases of concurrent jurisdiction. The serious consequences of such a restriction, if permitted to stand, can be illustrated by the circumstances of the litigation at bar. The court below directed the district court to transfer the case to the Northern District of Ohio pursuant to 28 U.S.C. § 1406(a). Assuming this section has any application to a suit pending at the time of enactment, the section expressly limits transfer of a suit to a district "in which it could have been brought." The court below made no finding that this action could have been brought in the Northern District of Ohio nor could it have done so in this case. If the Brotherhood can only be sued in Ohio where it is an inhabitant, it may not be suable at all to enjoin the violation of the Railway Labor Act. The complaint alleges that the defendant railroads operate along the eastern seaboard (R. 2) and they are in all probability not doing business in Ohio so that neither the federal nor state courts of Ohio would have jurisdiction over this cause of action.

Not only does the decision below discriminate against litigants in the District of Columbia courts by denying them the "state" forum, but it also sets up a completely unworkable venue procedure for the District of Columbia. If the decision of the court below means anything, it must mean that in order to invoke the "local" venue statute in any case in the District of Columbia, a plaintiff will have to show that if he had brought the suit in another jurisdiction, he could not have brought the suit in a federal court. In other words, "federal jurisdiction" will have to be negatived every time an effort is made to utilize the "local" venue statute in the District of Columbia courts. Neither the Congress nor this Court ever intended or sanctioned so unworkable a result.

B

Venue Was Properly Laid in the District Court under the Federal Venue Statute Considering the Case as a Class Suit

Petitioners contended before the district court and before the court of appeals that venue was properly laid in the District of Columbia because the suit was brought as a class suit as well as a suit against the Brotherhood in its common name. The two District of Columbia lodges of the Brotherhood and the two secretaries of those lodges were joined as defendants along with the Brotherhood. Since these two local lodges and their two secretaries are inhabitants of the District, the inhabitancy requirement of the federal venue statute, 28 U.S.C. § 112 (now 28 U.S.C. § 1391), is fully satisfied. The sole question is whether these two local lodges and their two secretaries "insure the adequate representation of all" the class under Rule 23(a) of the Federal Rules of Civil Procedure.

Paragraph 12 of the bill of complaint (R. 4) is clear and explicit:

> "12. Upon information and belief, defendants subordinate Lodges No. 7 and No. 532 are all the lodges of defendant Brotherhood within the District of Columbia and are truly and fairly representatives of the other subordinate lodges of Brotherhood and of Brotherhood itself, and the interest of all the members, subordinate lodges and of the Brotherhood will be adequately represented in this action by the defendants. The defendants subordinate Lodges and the defendants McQuade and Lacey (the secretaries) are sued as representatives of the membership of all the subordinate lodges and of the Brotherhood itself as a class under Rule 23(a) of the Federal Rules of Civil Procedure."

The above allegation brings this case squarely within Rule 23(a) and *Tunstall* v. *Brotherhood of Locomotive Firemen and Enginemen*, 148 F. (2d) 403, upon which the district court relied in upholding venue. The allegations in the *Tunstall* case, as set forth in Judge Parker's opinion, are identical with the allegations in the case at bar.

Despite this, the court below held that the two local lodges and their secretaries did not "insure the adequate representation of all" the class under Rule 23(a), since these lodges and officers did not engage in the discriminatory agreements and arrangements charged against the Brotherhood. The court's distinction of the *Tunstall* case boils down to this: The District of Columbia lodges, so far as the record in this case shows, have no discriminatory agreements with the railroads; the lodges in the *Tunstall* case had such agreements; therefore, the lodges in the *Tunstall* case were representative of the entire class, whereas, the District lodges are not. But the question whether the members of the class sued will fairly represent the interest of the absent members in the litigation does not turn on whether those joined have participated as fully as the others in the acts complained of. The true test is whether the interests of the named defendants are sufficiently similar to those of the other members of the class to insure that the membership of the Brotherhood is "in fact adequately represented by parties who are present * * *" *Hansberry* v. *Lee*, 311 U. S. 32, 43 (1940).

The local lodges and secretaries have an identical interest with the Brotherhood in the preservation of the Brotherhood's treasury to which they contribute and upon which they rely in time of need. They have a common interest in the successful functioning of the organization and its policies. They have common lawyers whom the institution of this action "did bring . . . in fighting". *Tunstall* v. *Brotherhood of Locomotive Firemen and Enginemen*, 148 F.

(2d) 403, 406. The lodges and officers joined as defendants have no interests which are "antagonistic to those whom . . . [they] would represent." *Moore's Federal Practice*, p. 2232 (1938). Just as in the *Tunstall* case, the local lodges and secretaries will fairly represent the entire class. See *Hansberry* v. *Lee*, 311 U. S. at 41-43.[6]

II

The District Court Did Not Err in Granting the Preliminary Injunction

The succeeding argument in petitioners' brief is predicated upon the assumption that this Court disposes of the argument under Point I in petitioners' favor and holds on one or both grounds that venue is properly laid in the District of Columbia. If this should not be the case, the remaining parts of the brief will, of course, not be relevant.

Before both the district court and the court below respondent Brotherhood urged that it had not been properly served with process, that the Norris-LaGuardia Act prohibits the granting of the preliminary injunction, and that the preliminary injunction should not have been granted because it alters the status quo. The district court rejected all three of these arguments (R. 59-61, 65-66, 65) and issued the preliminary injunction (R. 70-72). The court below did not rule on these three points because it held that venue had been mischosen. In its Opposition to the petition for certiorari the Brotherhood stated that "in the event this case is reviewed by this Court, respondent will urge those additional grounds for affirmance" (p. 4, note). Petitioners join the Brotherhood in urging this Court to pass upon these three questions. The Court has the bene-

[6] Moore's Federal Practice refers to an action "by or against representatives of an unincorporated association" as "a good illustration" of the "true class suit" (p. 2236). The decision below, if permitted to stand, would seriously curtail the utility of the device of a class action which Rule 23(a) was designed to afford.

fit of an adequate record and a well-reasoned decision of the district court; in the exercise of a sound discretion, this Court should resolve these questions and terminate the dispute over the preliminary injunction. *Ecker* v. *Western Pac. R. R. Corp.*, 318 U. S. 448, 489 (1943); *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U. S. 555, 567, 568 (1931); *Cole* v. *Ralph*, 252 U. S. 286, 290 (1920); *Delk* v. *St. Louis & S. F. R. Co.*, 220 U. S. 580, 588-589 (1911). The return of the case to the court of appeals for a decision on one or more of these three questions would only further delay the determination of a case already far too long delayed and result in the displacement of and extreme injustice to additional colored firemen.

A

Service of Process

Respondent Brotherhood not only relied in the courts below on its plea of "improper venue", but it even contended that it had not been served with process. The district court, in denying the Brotherhood's motion to quash service, referred to the motion "as technical and dilatory" and stated that courts are "astute not to sustain such a motion in cases where it is clear that notice actually reached the defendant" (R. 59)—as it did here.

As a matter of fact, it is perfectly clear that in this case the Brotherhood was properly served with process not only as an entity in its common name under Federal Rule 4(d)(3) but also as a class under Rule 23. A brief reference to each point will suffice.

1. The Brotherhood is, of course, suable as an entity in its common name (*United Mine Workers of America* v. *Coronado Coal Co.*, 259 U. S. 344 (1922); *Busby* v. *Electric Utilities Union*, 147 F. (2d) 865 (App. D. C., 1945)) and service was accomplished in accordance with Rule 4(d)(3)

which provides for service upon an "unincorporated association which is subject to suit under a common name, by delivering a copy • • • to any • • • agent authorized • • • by law to receive service of process. • • •" What is required by Rule 4(d)(3) and what was performed here was service in accordance with principles of general or common law. *Moore's Federal Practice*, p. 307 (1938). The Marshal's return shows that he served Russell, who was in charge of the Washington office of the Brotherhood in the absence of the Vice-President because of illness, and McQuade, Lacey and Reynolds, the recording and financial secretaries of the two subordinate lodges of the Brotherhood in the District. The testimony of Lacey and Reynolds and the Constitution of the Brotherhood itself demonstrate that these secretaries not only collect and transmit funds to the Brotherhood, but perform a myriad of other duties on its behalf (R. 52-59). The district court took testimony and found "that the defendant subordinate lodges which were served with process are agents of the defendant Brotherhood for that purpose, and that the defendants William Lacey and Marven M. McQuade and J. P. Reynolds, who were served with process are officers of subordinate Lodges of the defendant Brotherhood and that their duties and relation to the defendant Brotherhood are such that it is reasonable to conclude that they would give notice of this action to the proper officers of the defendant Brotherhood • • •" (R. 45). See *International Shoe Co.* v. *Washington*, 326 U. S. 310, 320 (1945); *Milliken* v. *Meyer*, 311 U. S. 457, 463 (1940).

Service of process on the secretary of a local union is valid service on the International Union. *Operative Plasterers Association* v. *Case*, 93 F. (2d) 56 (App. D. C., 1937);[7]

[7] The exact question in the *Operative Plasterers* case was whether the service underlying a North Carolina judgment (service on the secretary of a local union) was sufficient to accord that judgment the right to full

Brotherhood of Trainmen v. *Agnew*, 170 Miss. 604, 155 So. 205 (1934). As Judge Parker stated in the *Tunstall* case, involving the validity of service on an officer of a local lodge of the same defendant Brotherhood, "an association or corporation certainly ought not to be heard to say that agents through which it transacts the very business for which it is organized and through which it collects funds in a given territory are not agents of such character that process may be served upon them." *Tunstall* v. *Brotherhood of Locomotive Firemen and Enginemen*, 148 F. (2d) 403, 406. No authority or reason has been suggested why more should be required here than that service be made "by a method reasonably calculated to give the person or entity knowledge of the attempted exercise of jurisdiction and an opportunity to be heard." *Operative Plasterers Association* v. *Case*, 93 F. (2d) 56, 65. Here service was upon financial and recording secretaries of the local lodges whose duties require their constant contact with the Brotherhood and the fact is that this service did result in notice of the suit being given to the proper officers and "did bring the Brotherhood in fighting." *Tunstall* v. *Brotherhood of Locomotive Firemen and Enginemen*, 148 F. (2d) 403, 406.

2. As already pointed out, petitioners brought this suit not only against the Brotherhood an an entity, but also against its membership as a class. Thus, paragraph 12 of the bill of complaint states that "the defendant subordinate lodges and the defendants McQuade and Lacey are sued as representatives of the membership of all the subordinate lodges and of the Brotherhood itself as a class under Rule 23(a) of the Federal Rules of Civil Procedure" (R. 4). These allegations in the bill of complaint are modeled upon the allegations in the *Tunstall case*, and as

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faith and credit in a suit against the International Union in the District of Columbia, but there were no peculiar requirements for service under North Carolina law and the general rule of law applicable under Rule 4 (d)(3) was applied to the question of service by the court.

Judge Parker said there, "it cannot be contended with any show of reason that Munden (the secretary) and the subordinate lodge, who were admittedly served, were not fairly representative of the membership of the brotherhood, or that service upon them would not give adequate notice to the class sued to come in and defend; and this, we think, is the criterion as to the sufficiency of joinder and service in a class sued." *Tunstall* v. *Brotherhood of Locomotive Firemen and Enginemen*, 148 F. (2d) 403, 406.

B.

THE NORRIS-LAGUARDIA ACT

The Norris-LaGuardia Act, 29 U. S. C. §§ 101-115, is inapplicable to petitioners' suit to vindicate their rights under the subsequently enacted Railway Labor Act. *Tunstall* v. *Brotherhood of Locomotive Firemen and Enginemen*, 323 U. S. 210 (1944); *Virginian Ry. Co.* v. *System Federation*, 300 U. S. 515 (1937). The decision in the *Tunstall* case and the specific holding and express language in the *Virginian Ry.* case dispose of respondent Brotherhood's contention as to the applicability of the Norris-LaGuardia Act which, it might be noted, is raised in this suit for the first time after six years of earlier litigation.

In the *Tunstall* case this Court held that the bill of complaint stated a proper cause of action for equitable relief in the federal courts. 323 U. S. at 213-214. The Court so held although it was quite clear that the complaint did not contain the various allegations—disproportionate injury, failure of public officers to protect property, efforts at mediation, etc.—required by the Norris-LaGuardia Act (29 U. S. C. §§ 107, 108).[8] Despite the failure of the Brother-

[8] When the *Tunstall* case went back for trial, a summary judgment against the Brotherhood was entered by the district court, 69 F. Supp. 826, affirmed by the Fourth Circuit Court of Appeals, 163 F. (2d) 289 and certiorari was denied by this Court, 332 U. S. 841 (1947). The summary

hood and the railroads to raise this point, it would have been appropriate for this Court to consider the applicability of the Norris-LaGuardia Act *sua sponte* since the question goes to the jurisdiction of the court to issue an injunction. "Either the trial court or the appellate may, of its own motion, take the objection that the case is not within the equity jurisdiction." *Twist* v. *Prairie Oil & Gas Co.*, 274 U. S. 684, 690 (1927); *Douglas* v. *City of Jeannette*, 319 U. S. 157, 162 (1943).

One does not have to go far to determine why neither Mr. Chief Justice Stone, who wrote the opinion in the *Tunstall* case, nor the Brotherhood nor the railroads raised the question of the Norris-LaGuardia Act in that case. The reason is the unanimous opinion of this Court in *Virginian Ry. Co.* v. *System Federation*, 300 U. S. 515 (1937), also written by Mr. Chief Justice Stone, which is determinative of the question in the present case as it was in the *Tunstall* case. Like the present case and the *Tunstall* case, the *Virginian Ry.* case was an action by employees to obtain an injunction to enforce rights granted by the Railway Labor Act. Mr. Chief Justice (then Mr. Justice) Stone's opinion, holding the Norris-LaGuardia Act inapplicable, is clear and concise (300 U. S. at 562-563):

> "Petitioner assails the decree for its failure to conform to the requirements of section 9 of the Norris-LaGuardia Act (29 U. S. C. A. § 109), which provides: 'Every restraining order or injunction granted in a case involving or growing out of a labor dispute shall include only a prohibition of such specific act or acts as may be expressly complained of in the bill of complaint or petition filed in such case and as shall be expressly included in • • • findings of fact made and filed by the court'. The evident purpose of this section, as its history and context show, was not to preclude man-

judgment, of course, would have been improper if the Norris-LaGuardia Act were applicable, since no injunction may be issued except on testimony taken in open court (29 U.S.C. § 107).

datory injunctions, but to forbid blanket injunctions against labor unions, which are usually prohibitory in form, and to confine the injunction to the particular acts complained of and found by the court. We deem it unnecessary to comment on other similar objections, except to say that they are based on strained and unnatural constructions of the words of the Norris-LaGuardia Act, and conflict with its declared purpose, section 2 (29 U. S. C. A. § 102), that the employee 'shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.'

"It suffices to say that the Norris-LaGuardia Act can affect the present decree only so far as its provisions are found not to conflict with those of section 2, Ninth, of the Railway Labor Act (45 U. S. C. A. §152, subd. 9), authorizing the relief which has been granted. Such provisions cannot be rendered nugatory by the earlier and more general provisions of the Norris-LaGuardia Act • • •"

Just as in the *Virginian Ry.* case, here we have an attempted application of the Norris-LaGuardia Act which would conflict with its declared purpose of freeing the employee from employer coercion. Just as in the *Virginian Ry.* case, here we have a suit to vindicate collective bargaining rights under the Railway Labor Act, and "its provisions cannot be rendered nugatory by the earlier and more general provisions of the Norris-LaGuardia Act."

Mr. Chief Justice Stone in the *Steele* case pointed out the similarity between the rights being enforced in that case and the rights enforced in the *Virginian Ry.* case, as follows (323 U. S. at 207):

"• • • For the present command there is no mode of enforcement other than resort to the courts, whose jurisdiction and duty to afford a remedy for a breach of statutory duty are left unaffected. *The right is*

> *analogous to the statutory right of employees to require the employer to bargain with the statutory representative of a craft*, a right which this Court has enforced and protected by its injunction in Texas & N. O. R. Co. *v.* Brotherhood of Railway & S. S. Clerks, supra, 281 U. S. 556, 557, 560 and in Virginian R. Co. *v.* System Federation, supra, 300 U. S. 548 and like it is one for which there is no available administrative remedy" (italics supplied).

This statement was incorporated by reference in the *Tunstall* case (323 U. S. at 213-214) and evidences the similarity between the rights asserted in the *Virginian Ry.*, *Steele* and *Tunstall* cases.

The action of this Court in the *Tunstall* and *Virginian Ry.* cases is firmly rooted in the history, purposes and procedures of the Norris-LaGuardia Act, as well as in the subsequently enacted Railway Labor Act. The entire history of the Norris-LaGuardia Act demonstrates that it was aimed at the abusive use of the injunction against the rights of labor. See Frankfurter and Green, *The Labor Injunction* (1930), Chapt. V. One has only to look at the public policy set forth by Congress in the Norris-LaGuardia Act and at its basic provisions to see the evil under attack. In Section 102, Congress declared that the individual unorganized worker is commonly helpless to obtain acceptable conditions of employment, that he should have full freedom of self organization, and that "he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection" (29 U.S.C. § 102). In Section 103 Congress outlawed the so-called "yellow-dog" contract (29 U.S.C. § 103). In Sections 104 and 105, Congress denied United States Courts jurisdiction to enjoin various acts connected with strikes, picketing and

"yellow-dog" contracts (29 U.S.C. §§ 104, 105). A law so conceived is not to be invoked to prevent a group of colored firemen from obtaining rights subsequently conferred by the Railway Labor Act.

Not only do the history and purposes of the Norris-LaGuardia Act show that Congress contemplated a situation far afield from the present action, but its methods of accomplishing those purposes are equally far afield. The operating provisions of the Norris-LaGuardia Act do not make practical sense as applied to petitioners' cause of action. For example, a finding "that the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection" (29 U.S.C. § 107(e)) can have no place in this case. See *United States* v. *United Mine Workers of America*, 330 U. S. 258, 276 (1947). Nor, for example, are efforts at mediation or arbitration a realistic requirement as applied to a dispute between the colored firemen and the Brotherhood which purports to be their bargaining representative (29 U.S.C. § 108).

The action of this Court in the *Tunstall* and *Virginian Ry.* cases disposes of respondent's belated effort to rely upon the Norris-LaGuardia Act as a shield for continuing its discriminatory acts. Petitioners' rights under the Railway Labor Act cannot be rendered nugatory by the earlier and more general provisions of the Norris-LaGuardia Act, a law whose history, purposes and methods are far afield from the present action.[9]

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[9] In the courts below respondent relied upon two cases in which this Court refused to allow an employer to enjoin the picketing of his premises. *Lauf* v. *Shinner*, 303 U. S. 323 (1938); *New Negro Alliance* v. *Sanitary Grocery Co.*, 303 U. S. 552 (1938). As we have already seen, the Act was passed to prevent exactly that. These cases have no relationship to the case at bar where a group of employees are seeking to enforce their rights to the fair representation guaranteed by the Railway Labor Act.

C

THE PRELIMINARY INJUNCTION WAS A PROPER EXERCISE OF THE DISTRICT COURT'S DISCRETION

Few principles of law are more firmly established than the one which recognizes that the granting or denial of a preliminary injunction is a matter resting in the sound discretion of the trial court; and that an appellate court is not to disturb such a determination except in a plain case of abuse of discretion. *Meccano Ltd.* v. *John Wanamaker*, 253 U. S. 136, 141 (1920); *Alabama* v. *United States*, 279 U. S. 229 (1929). Far from any abuse of discretion, the opinion and the findings of the district court amply justify interlocutory relief.

Every sound reason of public policy and private right called for the issuance of the preliminary injunction. First, none of the facts alleged in the complaint and in McLaurin's affidavit were in any way disputed by the Brotherhood. Second, the questions of law which are involved in this case have been definitely decided against respondent by this Court and the Fourth Circuit Court of Appeals. Third, the issuance of a preliminary injunction in this case is peculiarly justified since this is an action to enforce public as well as private rights and courts of equity "go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved." *Virginian Ry. Co.* v. *System Federation*, 300 U. S. 515, 552 (1937).

The invalidity of the Southeastern Carriers Conference Agreement of February 18, 1941 has been conclusively determined by the Supreme Court in the *Steele* and *Tunstall* cases, 323 U. S. 192, 323 U. S. 210. The attempted justification of its conduct by the Brotherhood in the *Tunstall* case has finally been found to be without substance by the Dis-

trict Court in Virginia (69 F. Supp. 826) and by the Circuit Court of Appeals (163 F. (2d) 289), and on December 15, 1947 this Court refused to review their determinations (332 U. S. 841). As has already been pointed out, there is nothing in the record to dispute the facts alleged in the complaint and McLaurin affidavit which bring the case at bar squarely within the earlier rulings. Petitioners are suffering clear irreparable injury in being deprived of the job assignments to which their seniority rights entitle them. The railroads took no appeal and there is no possible reason why, pending the determination of this action the outcome of which is enshrouded in so little doubt, the Brotherhood should be permitted to continue its discrimination against petitioners and their class and reap a new harvest of fruits of its unlawful conduct. See pp. 37 to 40, *infra*.

Even if this preliminary injunction could be said to disturb the *status quo* in the sense that it prevents new discriminations against negro firemen, this would be no argument against the propriety of granting interlocutory relief in view of the compelling reasons outlined above. But in a real sense, the order of the district court preserves the *status quo*. It does not require the parties to undo past discriminations against negro firemen in the assignment of jobs. It only requires that in the future assignments of "runs" petitioners and their class be given the assignments to which their seniority entitles them. The order requires only that the normal seniority practices which the railroads have followed in the absence of discriminatory agreements and arrangements be followed in the future. The injunction, therefore, really preserves the *status quo* by preventing the infliction of additional irreparable injury upon petitioners and their class pending the final determination of this action.

The Brotherhood argued in the court of appeals "that the interlocutory relief granted below gives in major part the final relief requested" (p. 26, 29) and seemed to contend that this is an argument against the preliminary injunction. Respondent is wrong on its facts—the preliminary injunction is not the final declaration of rights requested; it does not restore any jobs, it does not order any payments for back wages, it does not prevent respondent from continuing to represent the entire class of firemen under the Railway Labor Act. All the preliminary injunction does is to prevent new discriminations on future job assignments during the course of a trial which respondent could long since have had upon a simple request to the district court.[10] If respondent seriously believes that the preliminary injunction gives in major part the final relief requested, it can mean only one thing—that whenever respondent is at last effectively enjoined from future discriminations, whether by temporary or permanent injunction, it will have to arrive at a fair settlement with the colored firemen it has betrayed these long years. Such an argument can hardly avail respondent in a court of equity.

III

Request for Ancillary Relief: Reinstatement of Preliminary Injunction

Petitioners respectfully urge this Court, if it should determine to send the case back to the court of appeals for action on any of the three questions discussed under Point II, to

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[10] The district court stated, after granting the preliminary injunction, that the case would be advanced for prompt trial upon application by any defendant (Transcript p. 189). The Brotherhood made no such application.

direct the court below to vacate the stay and reinstate the preliminary injunction during the pendency of the case there.[11] "This Court has power not only to correct errors in the judgment entered below, but, in the exercise of its appellate jurisdiction, to make such disposition of the case as justice may now require." *Dorchy* v. *Kansas*, 264 U. S. 286, 289 (1924). See also *Ex Parte Republic of Peru*, 318 U. S. 578, 582-586 (1943); *Villa* v. *Van Schaick*, 299 U. S. 152, 155 (1936); *Patterson* v. *Alabama*, 294 U. S. 600, 607 (1935); *Watts, Watts & Co.* v. *Unione Austriaca*, 248 U. S. 9, 21 (1918). Unless this Court grants this ancillary relief, petitioners may be subjected to an additional long delay in the court of appeals during which more and more colored firemen will lose their hard-earned positions on the southeastern railroads and the ultimate judgment will be a hollow victory.

Petitioners' bill of complaint and motion for a preliminary injunction were filed on October 27, 1947—nearly two years ago. The complaint and the affidavit in support of the motion for preliminary injunction declare that the negro fireman's job and seniority rights are matters of life and death to him (R. 30); that the negro fireman cannot develop new skills and has no financial means of supporting himself and his family during this extended litigation (R. 30-31); that as Diesel engines replace steam power on the southeastern railroads, more and more negro firemen are being displaced or demoted unlawfully and their complete elimination from their time-honored jobs as locomotive firemen is inevitable (R. 30). The affidavit then prophetically states (R. 30-31):

> "In all Court actions heretofore brought to enjoin the unlawful practices here complained of, the defend-

[11] Of course, if this Court resolves all the questions dealt with earlier in the brief, it will not be necessary to consider this point; it is presented

ants have entered dilatory pleas and motions and have resisted all efforts to bring the issues to early determination. It is to be anticipated that similar moves will be made in this action. The passage of time necessary before there can be a final hearing and determination in this action will bring about the displacement or demotion of many of these plaintiffs and ultimate judgment in their favor will be a hollow victory. * * * Unless the enforcement of the said agreements and the practices thereunder are enjoined pending the final hearing in this action, irreparable injury and loss of the means of livelihood will be suffered by many of the plaintiffs and other Negro firemen similarly situated."

On December 3, 1947, after hearing testimony and argument, the district court found that the Brotherhood "is continuing and threatens to continue * * * to deny them (colored firemen) preferred runs on Diesel locomotives and otherwise to which their seniority entitles them, and in like manner to displace and discriminate against other Negro firemen employed by the said railroads on whose behalf these plaintiffs sue" (R. 68). The district court therefore ruled that "a temporary injunction should issue so that pending the final hearing and determination of this action no further injury should be inflicted upon these plaintiffs or other Negro firemen employed by the said railroads on whose behalf plaintiffs also sue." (R. 69.) Despite these findings, not controverted by the Brotherhood, the court of appeals immediately vacated the preliminary injunction (R. 81, 82), thereby permitting nearly two years of additional discriminations.

The factual allegations in the bill of complaint and McLaurin affidavit and the district court's findings are borne out by continued displacements of colored firemen since

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only in the event that this Court should hold that venue is properly laid in the District of Columbia and also should decide not to consider and resolve the questions dealt with under Point II above.

the preliminary injunction was set aside by the court of appeals. The Brotherhood will not be able to deny that additional colored firemen have lost their hard-earned positions throughout 1948 and 1949 and even since this Court granted certiorari in this very case. The question presented here is whether this discrimination should be allowed to continue while the matter is pending further before the court below. For the following reasons we urge that the Brotherhood's discriminatory practices have already been too long tolerated:

1. Five years have elapsed since this Court held in the *Steele* and *Tunstall* cases that the Brotherhood was acting in violation of the Railway Labor Act and that its discrimination against negro firemen based upon their race was "invidious" as well as "illegal." "The Brotherhood and the railroads which have cooperated with it—whether willingly or not—have completely ignored and disregarded the Supreme Court's ruling. They have continued to go their own way without paying any attention to the law of the land as it has been applied to the very contract here in issue by the highest tribunal." *Memorandum of the United States in the District Court.*

2. Petitioners' complaint and motion for preliminary injunction are an effort to enforce the *Steele* and *Tunstall* rulings in a single lawsuit. The Brotherhood, in opposing the motion, filed no affidavit or other evidence in the district court challenging any of the facts set forth by petitioners in their complaint and affidavit. Its sole defense has been its effort to avoid the jurisdiction of the courts below as it has done in all the other suits that have been brought to vindicate the rights of the colored firemen.[12]

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[12] See Appendix to Memorandum for the United States as Amicus Curiae filed in this case December 1948 in support of the petition for certiorari.

Thus, on the merits of the case, the facts are not controverted, and, as the district court stated, "no doubtful question of law is involved" (R. 65).

3. The preliminary injunction is necessary to protect the public interest in the policies prescribed by the Railway Labor Act. See *Virginian Railway Co.* v. *System Federation*, 300 U. S. 515, 552 (1937). As the Government stated to the district court in filing its memorandum in support of the preliminary injunction, "there is a public as well as a private interest in this litigation which requires that the defendants' unlawful discriminatory conduct be restrained at the earliest moment."

4. No relief can be expected from the court of appeals. As was pointed out earlier (p. 7, *supra*), that court's stay of the preliminary injunction was granted over petitioners' opposition and even petitioners' motion for an early argument was refused. The delay of nearly a year in the court of appeals, after staying the preliminary injunction, was a misapplication of judicial power.

5. The continued displacement of colored firemen in the very teeth of the *Steele* and *Tunstall* rulings and the district court's findings in this case is an unconscionable abuse of equity and justice. Unless the preliminary injunction is reinstated promptly, the Brotherhood of Locomotive Firemen and Enginemen may yet win their war of delay and attrition and gain final success in their efforts to flout the decisions of this Court.

Conclusion

Venue was properly laid in the District of Columbia. In the exercise of a sound discretion, this Court should resolve the three other objections to the preliminary injunction raised by the Brotherhood; on examination these objections

prove wholly without merit. If, however, this Court should remand the case to the court of appeals for a decision on these questions, it is respectfully submitted that equity and justice demand the vacation of the stay and the reinstatement of the preliminary injunction while these questions are being determined by the court below.

Respectfully submitted,

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SEPTEMBER, 1949.

APPENDIX

28 U. S. C. § 112. Federal Venue Statute.[13]

"(a) Except as provided in sections 113 to 117 of this title, no person shall be arrested in one district for trial in another, in any civil action before a district court; and, except as provided in sections 113 to 118 of this title, no civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suits shall be brought only in the district of the residence of either the plaintiff or the defendant."

28 U. S. C. § 1406. Cure or waiver of defects.

"(a) The district court of a district in which is filed a case laying venue in the wrong division or district shall transfer such case to any district or division in which it could have been brought."

§ 11-306—D. C. Code. General jurisdiction.

"Said court (except as otherwise provided in this title) shall have cognizance of all crimes and offenses committed within said district and of all cases in law and equity between parties, both or either of which shall be resident or be found within said district and also of all actions or suits of a civil nature at common law or in equity, in which the United States shall be plaintiffs or complainants; and of all seizures on land or water, and all penalties and forfeitures made, arising or accruing under the laws of the United States."

§ 11-308—D. C. Code. Actions—Limitation upon—Inhabitants or sojourners in District of Columbia.

"No action or suit shall be brought in the District Court of the United States for the District of Columbia

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[13] 28 U.S.C. § 1391, the revised federal venue statute, contains no relevant changes.

by original process against any person who shall not be an inhabitant of, or found within, the District, except as otherwise specially provided."

Constitution: Article I, Section 8, Clause 17.

"The Congress shall have Power . . .

Cl. 17. To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;—"

Constitution: Article III, Section 1.

"The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."

Constitution: Article III, Section 2.

"Cl. 1. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."

Rule 23. Federal Rules of Civil Procedure. Class Actions.

"(a) Representation. If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is

(1) joint, or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it;

(2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or

(3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought."

Rule 4(d)(3). Federal Rules of Civil Procedure. Service.

"Service shall be made as follows:

"(3) Upon a domestic or foreign corporation or upon a partnership or other unincorporated association which is subject to suit under a common name, by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant."

Norris-LaGuardia Act (Act of March 23, 1932, 47 Stat. c. 90; 29 U. S. C., §§ 101-115):

"102. In the interpretation of this Act and in determining the jurisdiction and authority of the courts of the United States, as such jurisdiction and authority are

herein defined and limited, the public policy of the United States is hereby declared as follows:

"Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; therefore, the following definitions of, and limitations upon, the jurisdiction and authority of the courts of the United States are hereby enacted.

"103. Any undertaking or promise, such as is described in this section, or any other undertaking or promise in conflict with the public policy declared in section 2 of this Act [§ 102 of this title], is hereby declared to be contrary to the public policy of the United States, shall not be enforceable in any court of the United States and shall not afford any basis for the granting of legal or equitable relief by any such court, including specifically the following:

"Every undertaking or promise hereafter made, whether written or oral, express or implied, constituting or contained in any contract or agreement of hiring or employment between any individual, firm, company, association, or corporation, and any employee or prospective employee of the same, whereby

"(a) Either party to such contract or agreement undertakes or promises not to join, become, or remain a member of any labor organization or of any employer organization; or

"(b) Either party to such contract or agreement undertakes or promises that he will withdraw from an employment relation in the event that he joins, becomes, or remains a member of any labor organization or of any employer organization.

"104. No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

"(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

"(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in Section 3 of this Act [§ 103 of this title];

"(c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;

"(d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;

"(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

"(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

"(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

"(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

"(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in Section 3 of this Act [§ 103 of this title].

"105. No court of the United States shall have jurisdiction to issue a restraining order or temporary or permanent injunction upon the ground that any of the persons participating or interested in a labor dispute constitute or are engaged in an unlawful combination or conspiracy because of the doing in concert of the acts enumerated in Section 4 of this Act [§ 104 of this title].

"107. No court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as herein defined, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto, if offered, and except after findings of fact by the court, to the effect——

"(a) That unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained, but no injunction or temporary restraining order shall be issued on account of any threat or unlawful act excepting against the person or persons, association, or organization making the threat or committing the unlawful act or actually authorizing or ratifying the same after actual knowledge thereof;

"(b) That substantial and irreparable injury to complainant's property will follow;

"(c) That as to each item of relief granted greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief;

"(d) That complainant has no adequate remedy at law; and

"(e) That the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection. * * *

"108. No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration."